



## **Comments of the Organic Trade Association on AMS Docket Number TM-06-06-PR**

*May 12, 2006*

The Organic Trade Association (OTA) offers the following comments regarding the Proposed Rule AMS Docket Number TM-06-06-PR, and thanks USDA's Agricultural Marketing Service for this opportunity to comment on this Proposed Rule.

The Organic Trade Association (OTA) is the business association representing the organic agriculture industry in North America. Its 1,700 members include growers, shippers, processors, certifiers, farmers' associations, distributors, importers, exporters, consultants, retailers and others involved in organic trade. The majority of its members are small businesses, and 47% of OTA members report less than \$100,000 in annual revenue from organic sales. OTA encourages global sustainability through promoting and protecting the growth of diverse organic trade.

OTA recognizes that AMS Docket Number TM-06-06-PR is USDA's intended response to issues raised in the orders of Judge Hornby, June 9, 2005, in *Harvey v. Johanns*, and the ensuing amendment by the U.S. Congress of the Organic Foods Production Act (OFPA) in October 2005. Given this limited and expected rulemaking, the Department proposed a short comment period and limited the Proposed Rule to certain matters directly related to *Harvey v. Johanns*.

OTA members and leadership recognize that it is inevitable that this Proposed Rule cannot cover every matter of pending concern to the organic industry, and that these matters of concern will continue to emerge for discussion. We recognize that there is an ongoing process for consideration of needed enhancements and clarifications to the National Organic Program regulations via public discussion by the National Organic Standards Board (NOSB) public comment process; followed by NOSB recommendations to the National Organic Program (NOP) of the Agriculture Marketing Service (AMS) within the Marketing and Regulatory Programs (MRP) Mission area of the U.S. Department of Agriculture (USDA). The NOP staff can then consider steps to be taken to implement the recommendations of the NOSB, including consideration of notice and comment rulemaking, or an advanced notice of proposed rulemaking (ANPR).

Given that situation we have confined our formal remarks to the issues raised by *Harvey* or perceived by NOP to be raised by *Harvey* (i.e., changes in 7 CFR 205.606). However, we recognize that preceding *Harvey* there had been a concern, and there remains a concern, about the make-up of herds that produce organic dairy products – specifically replacement animals.

We note that USDA has decided not to extend the comment period for this rulemaking. In that notice USDA says that "it is necessary to proceed with this rulemaking to ensure timely compliance with court and Congressionally-mandated changes to the national organic program regulation. However, in the notice USDA recognizes that the final court order only addressed feed for dairy animals and there

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**Headquarters:** P.O. Box 547, Greenfield, MA 01302 USA • (413) 774-7511 • fax: (413-774-6432 • [www.ota.com](http://www.ota.com)

**Canadian Office:** 323 Chapel Street, Ottawa, On K1N 7Z2 • (613) 787-2003

**Legislative Office:** 600 Cameron St., Alexandria, VA 22314 USA • (202) 338-2900

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remains an issue that is of concern to many organic producers and consumers - the current two-track system for converting dairy replacement animals. USDA intends to engage in further rulemaking on this matter following the final rulemaking needed to comply with the final court order and judgment." We thank USDA for its immediate attention to this matter while recognizing that the current rulemaking is limited to the *Harvey* ruling.

We have been working, and will continue to work, with our dairy members and others to enhance the discussion of these issues, and look forward to participating in the public comment process. We were also pleased by the NOP's recent symposium April 18-19 in State College, Pennsylvania, on the important issue of pasture. We look forward to further clarification by the NOP of its views on this subject when the NOP proceeds to rulemaking, as announced in the Advanced Notice of Proposed Rulemaking published in the Federal Register April 13, 2006.

We also applaud the Department for retaining the strict criteria for evaluating synthetic substances in 205.600(b) of the regulations for the evaluation of synthetic substances before they are added to the National List. When Congress amended OFPA in 2005 to continue to allow for synthetic substances on the National List, it was essential that these criteria remain in the regulations as a safeguard, and this is why we support their continuation.

Following are the specific comments of OTA on the current proposed rule as cited above.

#### Dairy Feed

The proposed rule changes regarding dairy conversion are in keeping with Judge Hornby's ruling. We appreciate the insertion of language allowing crops and forage in the third year of conversion as well as retaining of the requirement that once an entire, distinct herd has been converted to organic production, all dairy animals shall be under organic management from the last third of gestation.

#### 7 CFR 205.606

**Products Labeled Organic:** We also appreciate that AMS has proposed an amendment to 7 CFR 205.606 that clarifies that only nonorganically produced agricultural products specifically listed in that section may be used as ingredients in or on processed products labeled as "organic." This is in compliance with the order of the U.S. District Court for the District of Maine issued June 9, 2005.

**Products Labeled "made with organic":** However, the Organic Trade Association strongly objects to the requirement in the proposed amendment that would prohibit the use of nonorganically produced agricultural products as ingredients in or on processed products labeled "made with organic..." unless they would be petitioned and listed individually in Section 205.606. Hundreds if not thousands of these petitions would need to be filed and approved by the National Organic Standards Board and by the Department before the deadline for compliance imposed by the District Court, June 9, 2007.

The *Harvey* decision called for a number of regulatory changes, but it did not call for any change in the National List status of nonorganic ingredients in "made with organic..." products. This portion of the proposed amendment of Section 205.606 would impose a cumbersome additional regulatory burden on hundreds of our association's members in advance of the deadline. Imposition of this burden would be outside the scope of the District Court order. Since this proposed regulation has been issued with only a very short period for public comment, and is intended solely to carry out the final judgment in the

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*Harvey* case by the District Court order of June 9, 2005, and the amendment to the Organic Foods Production Act (OFPA) of November 10, 2005, in this rulemaking the Department should not propose any amendment to the National Organic Program regulations that would go beyond the scope of the District Court order or the subsequent amendment to OFPA.

We will now explain why the proposed requirement that nonorganic agricultural ingredients in “made with organic...” products be listed individually on the National List is not within the scope of the *Harvey v. Veneman* decision, 396 F.3d 28 (1<sup>st</sup> Cir. 2005).

The court, in discussing the count involving the National List in Section 205.606, at 396 F.3d 35-6, did not address the question of whether it was a requirement of OFPA that nonorganic agricultural ingredients in “made with organic...” products be listed one-by-one in Section 205.606. If the court had reached this specific question, it would have readily found that OFPA itself does not lay down any requirement for listing the nonorganic agricultural ingredients in “made with organic...” products on the National List. Hence the court would have had no legal basis under OFPA for requiring the individual listing of nonorganic agricultural ingredients for products labeled “made with organic...”

The sole provision in OFPA that governs “made with organic...” products is 7 USC 6505(c)(1). If a processed product contains at least 50 percent organic content, this provision permits the use of the word “organic” on the principal display panel to describe those organic ingredients contained in the product. With regard to any standards for the nonorganic agricultural ingredients allowed in “made with organic...” products, under 7 USC 6505(c)(1) the Secretary of Agriculture, subject to consultations with the National Organic Standards Board and the Secretary of Health and Human Services, has full discretion to set these standards. The Secretary has used this discretion to put some restrictions on nonorganic ingredients in “made with...” products, but not to apply others. These choices are identified in Section 205.301(c) of the National Organic Program (NOP) regulations.

Until the *Harvey* decision, in the National List section of the NOP regulations, Section 205.606 contained the following “blanket” listing: “Any nonorganically produced agricultural product may be used in accordance with the restrictions specified in this section and when the product is not commercially available in organic form.” Instead of insisting that nonorganically produced agricultural ingredients be petitioned for the National List individually, the Department regarded this “blanket” listing as satisfying the OFPA requirement for listing of nonorganically produced agricultural ingredients in products labeled as “organic.” It also used its discretion under 7 USC 6505(c)(1) to use this same “blanket” listing to cover ingredients even if they were to be used only in “made with organic...” products. The *Harvey* court found that under a correct interpretation of OFPA, each ingredient needed to be petitioned and listed individually instead of being listed under “blanket” language. The court did not take any notice of the legal distinction under OFPA between nonorganic agricultural ingredients in “organic” products and those in “made with organic...” products. However, the court clearly stated that it was directing the Department to “clarify that this portion of the Rule may not be interpreted in a way that contravenes the National List requirements of OFPA.” 396 F.3d at 36.

This key language from the *Harvey* opinion defines the authority of that decision. The *Harvey* court concluded that the blanket listing does not fulfill “the National List requirements of OFPA.” What are these “National List requirements” in OFPA? In the case of nonorganic agricultural ingredients in products labeled “organic,” there is a National List requirement in OFPA, 7 USC 6510(a)(4), which clearly calls for listing nonorganic agricultural ingredients in processed products labeled as “organic” on the National List. However, for nonorganic agricultural ingredients in products labeled “made with

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organic...,” there is no requirement in OFPA that such ingredients be listed on the National List. Therefore, the *Harvey* case does not extend to these ingredients, which are currently covered in Section 205.606 by a “blanket” description.

The reason that Section 205.606 currently “lists,” in blanket fashion, nonorganic agricultural ingredients in “made with...” products is not because this is commanded under OFPA, but because the Department has chosen to exercise its discretion under 7 USC 6505(c)(1) to have these ingredients “listed” under Section 205.606 in blanket fashion. Before the *Harvey* decision, the Department had the legal discretion to have these ingredients listed on the National List in any fashion, including blanket fashion, or not to have them listed at all. The *Harvey* decision did not affect the Department’s discretion over the standards for nonorganic agricultural ingredients under 7 USC 6505(c)(1). The Department still has full legal discretion on what it wants to do about nonorganic agricultural ingredients in “made with organic...” products.

If the Department would wish to propose a change to require that nonorganic agricultural ingredients for “made with organic...” products be individually listed on the National List, the Department has discretion to propose that at some future time. However, in this rulemaking, in which interested parties have received only a very short comment period, it is not appropriate to propose such a change, because it is a matter outside the scope of the *Harvey* decision.

We propose, therefore, that Section 205.606 be divided into two separate subsections. One subsection, a new 205.606(a), would be entitled **Nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as organic**, and would contain the language as proposed, except that in the body of the text, the words “or ‘made with organic (specified ingredients or food group(s))’” would be deleted. The intent would be to have this subsection apply only to ingredients in or on products labeled as “organic.” This would fulfill the direction of the court that the Department clarify its regulation for the listing of nonorganic agricultural ingredients in “organic” products.

The second subsection, a new 205.606(b), would be entitled **Nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as made with organic ingredients**. This subsection would contain as its text the existing second paragraph of 205.606, the so-called “blanket” listing provision, which would still apply to ingredients for “made with organic...” products. However, since the NOP regulations, Section 205.301(c), state that “made with organic...” products do not need to use an organic ingredient in place of a nonorganic ingredient even when the organic ingredient is commercially available, the clause referring to commercial availability would not be relevant in the new 205.606(b). Therefore, the words “and when the product is not commercially available in organic form” should be deleted.

OTA appreciates the opportunity to comment. Thank you very much for your consideration.

